EXPLORING THE CASE FOR SIMPLIFICATION OF THE COPYRIGHT FRAMEWORK

REPORT OF PROCEEDINGS

Report commissioned by SABIP

Providing Government with strategic, independent and evidence-based advice on intellectual property policy

SABIP

STRATEGIC
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POLICY

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FOREWORD

In March 2009 the Strategic Advisory Board for Intellectual Property Policy (SABIP) published its Strategic Priorities for Copyright. This identified the simplification of the copyright framework as a key issue to explore. As part of this, SABIP asked "what, if any, specific steps would beneficially simplify the law and rationalise the provisions of the 1988 Act regarding copyright, in order that it be widely accessible and comprehensible, as well as being appropriately enforceable by those whose legitimate interests are undermined by breaches of copyright".

To that end, SABIP hosted a workshop on 16 July 2009 which brought together a diverse group of stakeholders to discuss whether simplification of the UK's copyright legal framework was needed, and if so, what the policy options might be. I would like to thank all those who attended the workshop for their participation and valuable contribution to the debate.

The workshop was introduced and facilitated by Professor Lionel Bently and Dr. Estelle Derclaye, members of SABIP's Copyright Expert Panel (CEP). This report summarises the proceedings on the day.

The Copyright, Designs and Patents Act 1988 has been subject to many amendments over the last 20 years. There is therefore an in principle case for simplification or wider wholesale reform. However alternative mechanisms have emerged to minimise the complexity of the underlying schemes for users (e.g. licensing systems). Such alternative mechanisms could theoretically be developed further to reflect advances in technology, to broaden their scope, and to improve further their ease of operation for users.

Empirical studies into how the complexity of the legal framework impacts on users (including educators) are needed, exploring the alternative mechanisms and how they could be improved further, or whether additional effort might be directed towards improving the understanding of copyright and copyright licensing and enforcement, via, for example, the introduction of official guidelines and codes of practice - all set against the more radical option of reform and/or simplification of the underlying statute.

SABIP is planning further discussions with a number of user groups to determine their particular concerns in respect of complexity or ease of access and use. If evidence of complexity emerges, we will use a range of research methods, such as case studies, focus groups and impact assessments to accurately define the needs of these users and identify a range of solutions (legislative and other). Should there be a need, we would aim to have any policy recommendations ready within twelve months.

If you have experience of the law being too complex, please let us know at info@sabip.org.uk.

Yours

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CONTENTS

I. Introduction

The Copyright Design and Patents Act 1988 (CDPA 1988) is the primary instrument that sets out the rules governing copyright in the UK. Ever since its enactment, some have complained about undue complexity. Since the passage of the Act, secondary legislation has been used to implement EU provisions and the moral rights provisions of the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty. This process, however, has contributed to a progressive increase in the complexity of copyright law. Arguably, this complexity has become an obstacle for non-experts, and may be producing negative effects for some creators and users, for example in terms of bargaining power with regard to larger or more knowledgeable stakeholders.

As part of its Strategic Priorities for Copyright[1], SABIP has identified six areas of research which have strategic importance for the UK. One of these areas is the possible simplification of the copyright framework. SABIP aims to:

> "consider what, if any, specific steps would beneficially simplify the law and rationalise the provisions of the 1988 Act regarding copyright, in order that it be widely accessible and comprehensible, as well as being appropriately enforceable by those whose legitimate interests are undermined by breaches of copyright" (SABIP, *Strategic Priorities for Copyright*, p. 20).

To explore the case for simplification of the copyright framework and possible future action, SABIP organised a stakeholder workshop which addressed the following questions:

(a) Is there an appetite for simplification? And,

(b) Which policy options would be favoured if simplification were to go ahead?

The discussion was introduced and facilitated by two presentations given by Professor Lionel Bently and Dr. Estelle Derclaye, members of SABIP's Copyright Expert Panel (CEP).

The active participation of representatives of rights holders, intermediaries and users at the workshop has provided SABIP with a picture of the areas where copyright simplification may be required, and helped identify the advantages and drawbacks of possible processes of simplification.

1 SABIP (2009), *Strategic Priorities for Copyright, available at http://www.sabip.org.uk/copyright-100309.pdf*

II. Summary of recommendations

The following recommendations emerged from stakeholder discussions following the presentations:

A. Focus of future endeavours:

- Future studies and consultations on the issue of simplification should be based on a clear definition of the term 'simplification'.

- From the participants' feedback, it emerged that two main aspects should be the focus of further study. On the one hand, there appears to be a call for action to be taken in order to increase the general level of comprehension of the existing principles and language of copyright law. On the other hand, it is believed that the complexity that characterises certain aspects of that law is not always justified and could be reduced to improve the efficiency of copyright enforcement, licensing and indeed compliance.

B. Research methodology:

- It was suggested that evidence-based research could be helpful in ascertaining whether intervention for the purpose of simplification is justified, and in identifying the areas where such intervention might be required. However, given that no two markets are alike, it might be difficult to gather such evidence on a systematic basis.

- A literature review on the economics of copyright and simplification was considered to be beneficial as a starting point for future proposals.

- Comparative studies on simplification initiatives carried out in other countries, for example Australia, could provide insight and guidance for potential future action in the UK.

C. Policy options:

- The degree of depth of different policy options would have an impact on the level of legal certainty that stakeholders might face at different stages of the simplification process. A thorough reform that targeted complexity could provide uncertainty for a range of copyright industries if the process were lengthy. It was argued that, under certain circumstances, prolonged uncertainty would hinder creativity, investment and consumer acceptance and compliance within the industries involved. Instead of reform, additional effort might be directed at improving the public's understanding of copyright and copyright licensing and enforcement, via the introduction of official guidelines and codes of practice.

- It was stressed that the decision to open a primary instrument such as the CDPA 1988, or alternatively to use secondary legislation to reduce the complexity of national legislation, should take into consideration that copyright law needs to be flexible, because of the changing character of the technology to which it applies.

III. Background

A. Complexity: Form and substance of existing copyright law

Two recent academic contributions were presented as background to the workshop. Indeed, the following observations question the adequacy of the existing text and call for a reduction of the complexity of the current framework:

> "As a matter of form, the legislation is long… Of course, a stylistically unattractive Act is not, of itself, cause for reforming the law. It can be shown in addition, however, that the act is structurally complex as a matter of content" (Andrew Christie, 'A proposal for Simplifying United Kingdom Copyright Law', *European Intellectual Property Review* (2001), pp.26 -27).

> "Our IP laws are not complex merely because their subject is inherently complex. They are complex partly because they have been enacted in needlessly complex ways, and because they are not written to be understood by those who are mainly affected by them" (David Vaver, 'Reforming Intellectual Property Law: An Obvious and Not-so-Obvious agenda: The Stephen Steward Lecture for 2008', *Intellectual Property Quarterly* (2009), p. 147).

B. Sources of complexity

Professor Lionel Bently and Dr. Estelle Derclaye presented the argument that many factors have contributed to the complexity within UK copyright law, and indeed to how this law is interpreted. In broad terms, those factors are history, harmonisation, international norms and case law.

History	The current law is aging, and new technologies challenge its adequacy and effectiveness. The Act is also the result of cumulative history of legislative drafting, reflected in the style of the CDPA and its language. Sections 33, 59, 62 and 64 were all cited as containing provisions deriving from the 1911 Act which may have become obsolete in the digital age.
Harmonisation	The process of implementation of European Directives has required repeated amendment of domestic law, increasing the complexity of domestic provisions. In some cases, the implementing provisions differ from the text in the relevant Directives, or (for example in the case of originality of computer programs) there is no explicit implementation: in both cases, a reader needs to be familiar both with the terms of the Act and the Directive to gain a full picture of the law. Some further complexity has come from the way in which the European legislature has operated, sometimes defining the same concepts differently in different Directives (for example, there are different rules required in relation to TPMs in the computer programs Directive and in the Information Society Directive). This makes implementation all the more cumbersome.
International norms	Various international treaties to which the UK is a signatory such as the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and the European Convention of Human Rights affect the reading and interpretation of copyright legislation.
Case law	National courts have played a major role in clarifying and sometimes defining the principles of copyright law. Important examples of judicially elaborated principles that are not clearly in the Act include the so-called "idea-expression dichotomy" and the "public interest defence". In addition, the European Court of Justice actively contributes to the interpretation of community law and provides binding judgments on significant aspects of the discipline. The Court has, for example, given important judgments clarifying interpretation of the concepts of "originality", "part" and "public."

Though the four factors listed above create complexity for the copyright system, it was observed at the workshop that the different layers of copyright legislation and interpretation are often necessary to deal with varied and complex scenarios across different industries and to comply with regional and international obligations. The crucial matter is whether complexity could be reduced to the benefit of the system without compromising international obligations or having adverse effects on the overall efficiency of the system.

IV. Simplification and codification

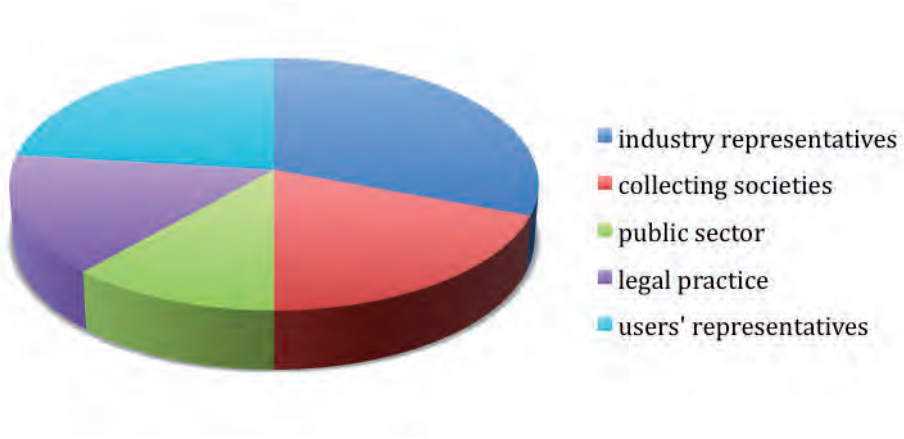
This part of the report summarises the outcomes of the stakeholder workshop, and provides an initial picture of the current attitude towards simplification. It does not seek to offer a full and systematic review of the scope of a possible simplification process that could affect the Act or secondary legislation. The discussion on simplification, in fact, is at its very early stages.

This report reflects the aim pursued in the workshop, namely to identify the issues that require further study, without claiming to find consensus or unequivocal views on the matters discussed by participants. The report attempts to recognise, from the reactions expressed by stakeholders during the workshop, whether there are any areas where simplification may be beneficial, the research methodologies and preliminary steps that could be adopted, and the potential advantages and disadvantages of certain policy options and approaches.

A. A stakeholder workshop: its rules and its audience

It should be observed that the workshop was held under Chatham House Rules. While information was exchanged freely during the workshop, it is not attributed to any of the individual participants.

Participants were selected to represent a widespread and varied array of stakeholder interests. This is summarised in the following chart:



B. The potential need for simplification and the degree of intervention

Professor Lionel Bently and Dr. Estelle Derclaye were invited to give two presentations. In the first presentation, they analysed the complexity of UK copyright law and, via practical case studies, compared the solutions available in the UK with those available in other countries (in this case Belgium and the United States). With this exercise, they considered whether there was a case for simplification.

In the second presentation, they discussed options for simplification and opened the discussion on the methods and scope of possible future initiatives. They proposed five approaches that, to different extents, could lead to an increase in the ability of those affected by copyright to access and understand the law, and to a reduction of the complexity of the copyright system.

The two presentations are available on request.

1. The impact of complexity

As a result of the case studies discussed in Presentation 1, stakeholders were invited to offer their views on the impact of complexity, particularly in the fields in which they operate.

The copyright system and its boundaries

The fundamental question coming from both rights holder and user representatives, was to what extent copyright law has an impact on the conduct of the members of the public who come into contact with copyright material.

"Complexity, comprehension, acceptance and compliance"

Some stakeholders argued that evidence of the system's over-complexity and consequent inoperability comes from the ease and frequency with which the law is broken by infringers who are then not pursued. The current legal framework was said to be inadequate, or even 'unrealistic', and the content industries were said to be facing a genuine threat from younger generations who are growing up without a solid understanding of the costs involved in creating content. It was suggested that compliance would be improved if copyright could be presented to the public in a more digestible way. This need not involve legal reform, with by-products such as uncertainty, but could include simple guides to copyright, rather like those for drivers.

However, other stakeholders did not fully embrace the submission that the public is unaware of the boundaries set by copyright law. There is evidence to suggest that, despite high levels of infringement of copyright law, many consumers understand that creators should be paid for the content they supply. The solution to be preferred would be to offer consumers a range of options for accessing content legally and at their convenience whilst at the same time providing remuneration to the creators.

"Copyright is complex because it needs to be"

A significant number of participants argued that copyright is complex because it needs to be and that the complexity arises because a one-size-fits-all system would not work. It was also argued by some that this complexity is irrelevant because mechanisms exist to ensure that consumers should not need to have extensive knowledge of copyright law. In other words, it should be possible to put in place administrative and business systems which transform the complexity into simple practices for consumers.

"Copyright complexity in commercial and non-commercial environments"

It was submitted that a public debate could facilitate the way copyright law is approached, understood and respected. Another suggestion was made to address the level of acceptance of copyright rules, namely that copyright should be a system designed to allow rather than restrict access by default, especially when uses of protected content occur in a domestic, non-commercial environment. Furthermore, another view was expressed that the issue of permitted uses is not limited to such non-commercial environments but is in fact a wider issue, which should be addressed as a matter of public policy: indeed, difficulties encountered in clearing rights may be hindering the exchange of information and knowledge (for example in the field of the sciences), and ultimately run the risk of producing a negative impact on innovation and the economy.

"Reduce complexity by increasing familiarity with collective licensing solutions"

In this context, the role of licensing agencies was considered to be particularly relevant. However, the degree of familiarity with licensing solutions offered by these agencies was believed to be low and thus a limiting factor on their effectiveness. In relation to the scenario put forward in Presentation 1, questions were raised on whether existing solutions based on collective administration could provide satisfactory answers. Some participants were keen to stress that certain collecting societies already offer licences for a variety of uses including those detailed in Presentation 1, and that indemnity schemes exist for the use of material that falls outside their repertoire. However, according to some of the stakeholders, two aspects of this practice are problematic: on the one hand, the details that users can access from the websites and from the literature supplied by licensing agencies do not adequately and expeditiously inform them about the scope of licences and how to obtain them; secondly, the legitimacy of a system based on an indemnity mechanism was hotly debated. It was argued that indemnity is a monetary solution and a safeguard for rights holders, which does not eliminate the inconvenience for users of being sued for copyright infringement. Two further points were made clear: firstly, that existing licensing solutions are only available as regards some works (published literary and artistic works); and secondly, that the use of these collective licensing mechanisms may not be available where works are supplied in electronic form and thus subject to individual, and often restrictive, licences.

One conclusion from this debate was that the complexity characterising the current copyright legal framework could possibly benefit from a process of simplification. Nevertheless, it was stressed that the current degree of complexity might be justified if it helps to safeguard and incentivise the development of innovative business models, or, in other words, if it contributes to the ability of investors to explore new means of dissemination and exploitation. In addition it was felt that, whilst a case can be made for the desirability of reform, there are many other issues that should take priority on the legislative agenda.

The language

The debate on whether the copyright framework per se is unduly complex remains open. A different issue is whether the language of copyright legislation is excessively complex. For some stakeholders at the workshop, the language of the CDPA 1988 represents an obstacle to the understanding of the principles of copyright, to their interpretation and their acceptance. In addition, the copious case law that contributes to delineating the boundaries of the copyright regime and defines some of its main concepts (e.g. originality, substantiality, etc.) can be said to be inaccessible to non-experts (and especially consumers). The difficulty in understanding the Act may thus require action with respect to business-to-consumer transactions rather than business-to-business copyright practice.

The difficulty in understanding fundamental aspects of the Act and their interpretation shifts the focus from the issue of complexity of the copyright system to its effective comprehension. As a preliminary point, a large number of stakeholders considered that guidelines explaining the language and fundamental principles of copyright legislation could help people's understanding and therefore overall compliance. For some stakeholders, it would be particularly important for any guidelines to be issued by a single, reliable and authoritative source.

Discussion on potential areas in need of simplification

In relation to the issue of complexity of certain areas of the copyright discipline, the following 'hot topics' were discussed:

- Subject matter: the Act lists the types of subject matter that can be protected under UK law. However, it was observed that the current style of categorisation could be problematic. For example, a work might qualify for more than one category (e.g. design and databases), or conversely the law can fail to accommodate works of undoubted creative character in any of the available categories.

- Originality: the threshold of originality establishes whether authorial works attract copyright protection. Given the disparities existing between the laws of different EU countries, participants questioned whether the current UK definition of originality is appropriate. Some of them submitted that the notion of 'oeuvres de l'esprit' coming from the French author's right tradition, or the definition of 'author's own intellectual creation' emerging from the acquis communautaire could provide a simpler, more flexible and appropriate solution to draw a line between the works that attract copyright protection and the works that remain outside its realm.

- Term of protection: a further matter of complexity is the duration of copyright that applies to protected works. Different types of work are afforded different terms of protection, and some participants felt that this generated difficulties in accessing, using and managing protected content.

- Limitations and exceptions: in relation to the fair dealing provisions contained in the CDPA, it was observed that the extent to which dealing can be considered 'fair' is unclear and that, as the relevant threshold is set out by case law, the ability to rely on the fair dealing provisions remains limited. More generally, a number of stakeholders said that the Berne three-step-test should be explicitly written into UK law through inclusion in the Act. The Berne Convention establishes exceptions to the exclusive right of reproduction in certain special cases, provided that this does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. Following the implementation of the Convention and other international instruments in EU law, this test also applies to acts other than reproduction. With regard to the UK, the ability to rely on the test by mere reference to EU law was described as inadequate by some participants, who would prefer to see the test enshrined in UK law.

- Education was considered to be an area where the difficulty in identifying the scope of limitations and exceptions (as set out in UK law) has a particularly negative impact. The case studies in Presentation 1 suggest that the use of protected material in the context of education is either limited because of the uncertainty surrounding permitted acts, or occurs in spite of the limits imposed by copyright legislation. In addition it was observed that the current provisions fail to recognise the advancement in teaching methods that could require the use of digital technology (e.g. the inclusion of digitised content in slideshow presentations). A generalisation of the three-step-test in the fashion of the Berne Convention could, arguably, negate the need to update limitations and exceptions in response to technological advancement. However, such generalisation could have the effect of failing to recognise the differences existing between uses of content in primary markets and in secondary markets. It was argued that if limitations and exceptions applied indiscriminately to both primary and secondary markets, the incentive mechanism on which content production relies could be jeopardised. According to this view, industry-specific exceptions should not be rejected in toto.

Call for further evidence

Future action to increase comprehension and reduce complexity of the copyright system may cover various areas, as indicated in the stakeholders' reactions to Presentation 1. To assess the appetite for such action and the form it might take, some stakeholders indicated that further evidence needed to be gathered.

There was a call for empirical evidence to be analysed from an economic perspective, to verify whether there is a basis to proceed with simplification in specific areas of the copyright framework. However, it was also understood that it would be difficult to gather the necessary empirical evidence, especially given the wide array of scenarios that could emerge across different industries.

Some stakeholders felt that, even if the case for simplification emerged only from anecdotal rather than empirical evidence, the fact that simplification is being discussed in business, academic and policy environments should constitute a valid reason to address the problem and formulate possible solutions.

Other stakeholders stressed the vital importance of identifying, in a systematic manner, cases where market players, consumers or educators are actually suffering due to the complexity before making a decision on future action. Once again, according to a portion of the audience, the problem with the call for this type of evidence is that each licensing scenario presents different challenges and degrees of complexity. This was considered by some to be a limitation on the ability to identify the areas where efforts towards simplification would be most beneficial.

With regard to the scope of further studies, it was suggested that the difficulties in compliance and rights clearance should be addressed not only by assessing the adequacy of copyright legislation, but also by focusing on the effects of the concurrent application of copyright and contractual instruments in the relevant fields. The work of licensing agencies would therefore become a primary subject of investigation.

2. Different forms of intervention

In the second part of the workshop, participants discussed specific aspects of options for simplification, as put forward in Presentation 2. This section of the report will summarise the rationale behind the options as presented and then review the stakeholders' reactions to the proposed approaches.

Option 1 Page 13	Tidying	This consists in a renumbering of the sections of the primary Act, together with the regrouping of secondary legislation (Statutory Instruments and Regulations).
Option 2 Page 14	Tinkering	A simplification process could be undertaken to deal with particular areas that were regarded as causes of complexity or examples of complexity.
Option 3 Page 15	Adding / Codifying	Understanding of copyright law would increase, for example, if there were an explanation of the purposes of the law, in the style of Recitals of TRIPS and of the EU Directives, and a codification of principles defined by case law (such as the notion of 'fairness' in 'fair dealing').
Option 4 Page 16	Restructuring of exceptions	The area of limitations and exceptions could benefit from a restructuring. Under the new approach, exceptions could be regarded in terms of the principles they aim to protect.
Option 5 Page 18	Radical Restructuring	This option would involve restructuring the law to reflect the categorical distinction and concepts that are found in international and regional instruments, such as the distinction between authors rights (falling under Berne) and related rights (as European Directives refer to them) or neighbouring rights (protected for example under the Rome Convention).

Option 1	**Tidying**	**This consists in a renumbering of the sections of the primary Act, together with the regrouping of secondary legislation (Statutory Instruments and Regulations).**

The Rationale behind Option 1

- The EU regularly codifies in this way.
- It would make the Act approachable and less off-putting.
- It would reduce information costs because the relevant rules would be available from a single body of law.

Stakeholders' comments on Option 1

- With respect to the possibility of tidying the copyright framework, it was stressed that this should only be initiated after reviewing which aspects need tidying and showing that the process would improve the system. There was a degree of apprehension around the concept of simplification and any proposed work in this field. Therefore, if Option 1 were pursued, it would be advisable to explain that the changes concerned the presentation of the Act and not necessarily its substance.

- A number of stakeholders considered that if the only recommendation was to renumber the act, it would be a waste of time and resources for the authorities in charge of the process. In addition, renumbering would also entail significant effort by practitioners, academics and publishers to update textbooks and other publications. Conversely, others submitted that an initiative aimed at renumbering would not be sufficient to address the issue of complexity, but may have an effect per se: it would also be a 'good start' for a wider process that should review substantive aspects of the law.

- It was suggested that the tidying process could be achieved via the adoption of a Consolidation Act in the style of the Employment Protection (Consolidation) Act 1978 (c. 44).

- It was also submitted that any process of tidying could still differentiate between primary legislation and secondary instruments: while the primary Act should remain the main legal corpus, other legislative tools such as Statutory Instruments could be used to ensure that the law kept up with technology.

Option 2	**Tinkering**	**A simplification process could be undertaken to deal with particular areas that were regarded as causes of complexity or examples of complexity.**

The Rationale behind Option 2

- The main structure of the Act would remain intact.
- Excessive complexity would be removed.
- Consistency with the acquis communautaire would increase.

Stakeholders' comments on Option 2

- Stakeholders proposed examples of areas where the current categorisation of protectable subject matter is unsatisfactory. They focused in particular on the existing definition of artistic works and stressed that the current law is out of date. It was however highlighted that, while it would be desirable to set a clearer standard to define protectable artistic works, this would inevitably entail a qualitative and subjective assessment, and thus should be approached with caution.
- Also with regard to the categorisation of protectable subject matter, it was observed that an open list might not be desirable. For example, if it increased the risk of conferring protection to works that should not be protected under copyright law. This may be the case for perfume. From this point of view, opening the categories of protectable subject matter could generate further complexity rather than reducing it. Conversely, it was pointed out that subject matter that does not currently attract copyright protection might still be protected, for example via contract. This is the case with TV formats, one of the creative outputs for which protection is most sought and granted without a clear recognition under copyright law.
- It was submitted that tinkering with protectable subject matter could have the effect of destabilising the system from a commercial point of view. More specifically, it was feared that, if the boundaries of copyright protection become unclear, the willingness to pay for protected content may decrease.
- The proposal to tinker with the definition of the standard of originality led to the question of whether this would necessitate the opening of a primary instrument, or if the same objective could be effectively pursued via Statutory Instruments. It was suggested that Statutory Instruments could offer the necessary flexibility to ensure that the discipline, in its definitions and application, remained capable of adapting to new technologies. Accordingly, there would be an advantage in keeping definitions separate from the primary act to avoid immediate obsolescence.
- With reference to the issue of definitions, concerns were expressed as to how the judiciary would receive and use legislation that extensively defined the relevant standards. It was argued that the existing legal system confers upon the courts the role of identifying and adjusting the standards of protection, and this allows those standards to adapt according to the technology in place.
- In relation to the removal of Crown copyright, many participants considered that any initiatives in that direction would amount to more than just tinkering.
- It was also observed that tinkering with the existing structure and language could produce, as a result, an Act that was better adapted to EU law. Arguably, the long-term positive effect would be that implementation of new directives and regional instruments into domestic law could become smoother.

Option 3	**Adding / Codifying**	**Understanding of copyright law would increase, for example, if there were an explanation of the purposes of the law, in the style of Recitals of TRIPS and of the EU Directives, and a codification of principles defined by case law (such as the notion of 'fairness' in 'fair dealing').**

The Rationale behind Option 3

- Such explanation could prove instrumental in consumer understanding of what they can and can't do.
- There is precedent – fairness factors are already listed in the US and Australia.
- The idea-expression dichotomy is already a part of common law, the EC Computer Programs Directive and TRIPs.

Stakeholders' comments on Option 3

- It was questioned how the addition of Recitals would be received and applied by judges, especially within the context of a common-law jurisdiction based on precedent and interpretation. In other words, there is a danger that Recitals would be used as a basis to add uncertainty and produce new interpretations. However, it was also suggested that modern forms of legislation appear to be drafted according to the style suggested in Option 3. They often list aims and objectives of the law in the opening part of the text.

- Some stakeholders rejected the proposal of codifying crucial concepts such as the idea-expression dichotomy, and argued that a statutory definition of standards could narrow down the applicability and relevance of those general concepts to future scenarios. Others considered that codification of the interpretation of fairness would be beneficial and reduce uncertainty.

- Arguably, codification could reduce flexibility as technological changes require continuous attention. It was stressed that, if principles were codified, the ability to update those principles and their interpretation in the context of future technological changes would decrease (see comments to Option 2, supra).

- It was submitted that Option 3 could amount to more than a reduction of the complexity inherent in the act. Codification of principles derived from the case law was seen as being a pervasive form of intervention. Overall, the question of the intended meaning of 'simplification' was addressed.

- A large number of stakeholders believed that the proposed clarification of principles and their interpretation could occur without opening the primary Act. Moreover, soft-law instruments could contribute to the clarification process (e.g. the issuing of explanatory guidelines and codes of practice).

Option 4	**Restructuring of exceptions**	**The area of limitations and exceptions could benefit from a restructuring. Under the new approach, exceptions could be regarded in terms of the principles they aim to protect.**

The Rationale behind Option 4

- There are currently 48 sections on exceptions.
- The ordering as it currently stands appears fairly arbitrary.
- This is the area of the copyright framework that users most need to know about.

Accordingly, Laddie J. (in Pro Sieben Media AG v Carlton U.K. Television Limited and Another, [1998] F.S.R. 43) submits:

> "For better or for worse, the Copyright Designs and Patents Act 1988 has set out a number of specific exceptions to the blanket scope of copyright infringement. [...] [S]ection 29(1) of the Act provides a defence where there has been fair dealing for the purposes of research or private study. However it applies only to literary, dramatic, musical or artistic works or the typographical arrangement of a published edition. It does not apply to sound recordings, film and cable programmes. […] Chapter III of the Act consists of a collection of provisions which define with extraordinary precision and rigidity the ambit of various exceptions to copyright protection. Although it is apparent that these provisions are designed to address situations where there are thought to be public policy grounds for restricting the copyright owner's rights, it is the legislature which has specified where and the extent to which the public policy overrides the copyright. The courts must construe the provisions. Within proper limits, they may do so in a way which is designed to make reasonable sense. But the provisions are not to be regarded as mere examples of a general wide discretion vested in the courts to refuse to enforce copyright where they believe such refusal to be fair and reasonable."

Stakeholders' comments on Option 4

- A widely-held view was that Option 4 would amount to a fundamental review of the system, and should not be defined as a proposal for simplification. A restructuring of the Act in this fashion would require extensive research to ensure compatibility with international obligations and workability in a common-law system. In addition, political will would be a necessary element in implementing such a proposal.
- The topic of limitations and exceptions generated a wide debate on the substance of the relevant provisions. According to a portion of the audience, exceptions should not be defined but ought to remain general. Their application should be based on a three-step-test in the fashion of the Information Society Directive. However, this view was opposed by some due to the degree of uncertainty that such a process of restructuring could generate. It was feared that the adoption of a general principle would leave the judiciary to set specific standards in the context of litigation, with the effect of creating more legal uncertainty.
- On a more specific note, it was observed that any evaluation of the scope of limitations and exceptions should take into account and clarify the extent to which contractual arrangements could interfere with the boundaries set under copyright law.
- Another point raised by participants was that rules on exceptions could be drafted in a manner that considered the economic relevance and differences between primary and secondary markets.

However, a difficulty with this approach emerges in relation to the role and safeguarding of education and educational institutions. In this respect, it was argued that the proposed restructuring should be considered as an issue of public policy. In fact, decisions concerning this topic would likely affect the balance between economic interests and other interests and principles that the law ought to protect.

- It was also observed that previous discussions and analysis of possible copyright reforms had already sought to identify areas where action was required (see Gowers Review of Intellectual Property, Recommendation 2). One of these areas is that of permitted uses, with particular reference to whiteboard provisions. It was suggested that, for the purpose of reducing complexity and modernising the system, this should remain the focus and scope of future action.

Option 5	**Radical Restructuring**	**This option would involve restructuring the law to reflect the categorical distinction and concepts that are found in international and regional instruments, such as the distinction between authors rights (falling under Berne) and related rights (as European Directives refer to them) or neighbouring rights (protected for example under the Rome Convention).**

The Rationale behind Option 5

- Some problems with UK copyright law appear to arise from the lack of correspondence between the structures of UK law and EU and international law.

- The UK implementation of the provisions of the Term Directive in relation to films is a cause for controversy. Arguably, the UK Act does not comply with those provisions. This is an example of the possible confusion that can emerge when definitions and distinctions in the codification of the national and regional laws do not correspond. It is indicative of the degree of restructuring that may be required to ensure full adherence to regional legislation.

- As we move inevitably towards deeper harmonisation of copyright in Europe, it would make sense to reform the structure of UK law to enable it to accommodate such reforms. To do so would involve something of a return to the structure of the 1956 Act, with 'Part 1' and 'Part 2' works.

Stakeholders' comments on Option 5

- A number of stakeholders queried whether the proposed option of "radical" restructuring would in fact entail any real change as it would only reflect existing international obligations. Indeed, the process of copyright harmonisation at the regional level has already introduced many aspects of the continental 'author's rights' perspective and practice. More generally, some participants queried whether there is in fact a need to move away from the common law tradition to embrace the continental approach. This question also raises the issue of implementing rules inspired by civil law in a jurisdiction that operates under a regime of common law.

- In order to evaluate whether Option 5 would facilitate compliance with international and regional obligations and benefit the copyright system at large, it was suggested that comparative studies could be commissioned to identify the successes and failures of similar types of reform undertaken in other jurisdictions.

- Some participants observed that radical restructuring could be a way of reducing the additional complexity that ensues every time EU directives need to be transposed into domestic law. However, it was also stressed that the proposed restructuring would not eliminate some of the main difficulties normally encountered in the process of implementing EU law, particularly with respect to the pace that characterises the adoption of regional instruments.

- It was submitted that Option 5 would be very costly. Some stakeholders were under the impression that Option 5 consisted in the adoption of completely new techniques of legislative drafting. Even if the proposed approach was not intended to introduce such a change, part of the audience considered it to be too far removed from the existing framework, particularly in terms of the language that would need to be introduced. Arguably, this could cause higher uncertainty as compared to the other proposed scenarios, and the costs of litigation would similarly be affected.

V. Questions

Following the proposals and policy points discussed in Part IV, this report now moves to consider some general questions and related key points discussed in the final part of the workshop, around which SABIP could develop future research projects.

A. Q – Who should implement the proposed process of simplification?

1) If it is found that a process of simplification is desirable, such a process should be structured in a way that considers the needs of all stakeholders in a democratic manner. This is the case even if simplification does not include serious re-codification of the relevant Act and the opening of primary legislation. This is necessary in order that any evolution of the framework enables the development of business solutions and is coherent with regional and international obligations.

2) If major changes are necessary and impinge upon the substance of copyright law, it would be advisable to create an ad hoc committee of experts. This was the approach that led to the Gregory Committee in 1951-1952, the review which preceded the Copyright Act of 1956, and the Whitford Committee between 1974 and 1977, which preceded the CDPA of 1988. The work of a committee conceived in this style, which could involve the drafting and issuing of consultation documents and the holding of hearings would help ensure that a reform that requires the re-opening of a primary instrument responds to a variety of policy needs, not only that of simplification.

B. Q – How should simplification be achieved?

1) Following this preliminary workshop aimed at gauging the appetite for simplification, SABIP could conduct, commission and / or supervise:
    - research aimed at gathering evidence on the advantages, drawbacks and impacts of simplification, prior to engaging in further action; and,
    - comparative studies concerning simplification initiatives in other countries.

2) With regard to the subsequent phases of the process none of the five policy options discussed above appears in itself to be the perfect answer to the difficulty of understanding and applying copyright law.

3) The most widely-held view amongst stakeholders as to the most viable solution to reduce the level of complexity of the system consisted of targeted actions aimed at tidying up and consolidation.

4) Some stakeholders believed that a process aimed at reducing the complexity of the current Act could be an aspect of a wider reform process. The decision to open a primary statute would have to be considered in terms of economic resources and parliamentary time. These opportunity costs would be justifiable if central copyright issues needed to be addressed. Thus simplification could take place at limited additional opportunity cost as and when other issues within the copyright framework need to be addressed.

5) The question of whether the proposed actions of simplification would affect the question of moral rights also deserves attention. It was observed that any changes in the area should take into account the current attitude of creators, of legal practice and of the general public towards moral rights, and how the UK system would adapt to the implementation of a more continental approach.

C. Q – Are there other issues that could be investigated in future research initiatives?

1) Registration of copyright and related rights remains an option to be investigated in relation to the costs associated with the tracking of ownership and rights clearance. In the course of the workshop, it was acknowledged that collecting societies play an important role in the process of rights clearance. However, it was also suggested that a register may facilitate users even further in their quest to obtain a licence. Thus, registration could increase compliance and decrease uncertainty.

2) The rules that define terms of protection appear to be complex. While this topic was briefly discussed in the early stages of the workshop, it warrants further expansion and investigation. It was noted that, taking aside a possible re-categorisation of protectable subject matter, it could be beneficial to have a clearer picture of how long protection lasts and how the term is calculated, especially for consumers.

VI. Conclusion

A number of stakeholders said that, whilst there are perceived problems with the copyright system in the UK, these may be due to the implementation of the system rather than the law itself. Others felt that the licensing schemes already in place provide a perfectly adequate service.

Copyright simplification and reform are linked. While the day's discussion did not focus on matters of substantive law, participants recommended that future SABIP workshops provide a more comprehensive presentation of the copyright framework, to help participants identify which aspects of existing legislation are especially in need of simplification and would benefit their respective fields of activity.

Overall, it was felt that, because any action towards simplification would likely bring about a certain degree of change in the interpretation and application of substantive law, all types of intervention should be assessed in terms of impact and considered carefully.

Simplification would indeed not be without costs. A process of change in the direction of a more coherent legislative text, according to SABIP, raises issues of compliance on the part of users and high enforcement costs for rights holders (SABIP, 'Strategic Priorities for Copyright', p. 19). Nevertheless, if the benefits outweighed these costs, simplification may yet prove desirable. Thus prior to entering any simplification process, it is necessary to demonstrate that its expected benefits more than offset the related costs.

SABIP should, in its independent role, play a pivotal role in developing a cost-benefit analysis for simplification, commissioning any necessary studies, and providing recommendations on the scope of future action. This would seem the best way for SABIP to pursue possible simplification of the Copyright Framework as one of its Strategic Priorities for Copyright.

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